

## NOTE

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## ARRAIGO IN MEXICO: VIOLATION OF INTERNATIONAL LAW

Julio MARTÍNEZ HERNÁNDEZ\*

*ABSTRACT: For the development of this note, I will begin by exposing the different components, giving a brief introduction to the doctrines that make up public international law, its application in Mexico, general conception of human rights, international human rights framework, and human rights in Mexico, description of arraigo, its constitutional and legal basis, practices, and results for the achievement of justice. The intention is to establish if the practice of arraigo in Mexico constitutes a violation of the state's international obligations.*

*KEYWORDS: Human Rights, International Law, Arraigo, Constitutional Regularity Parameter.*

*RESUMEN: Para el desarrollo de la presente nota iniciaré por exponer los distintos componentes, dando una ligera introducción a las doctrinas que integran el derecho internacional público, su aplicación en México; concepción general de derechos humanos, marco internacional de derechos humanos, y derechos humanos en México; descripción del arraigo, su fundamentación constitucional y legal, prácticas y resultados para la consecución de justicia. La intención es determinar si la práctica del arraigo en México constituye una violación de las obligaciones internacionales del Estado.*

*PALABRAS CLAVE: Derechos humanos, derecho internacional, arraigo, parámetro de regularidad constitucional.*

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\* B. A. in Law from the Autonomous University of Tlaxcala, student of the M. A. in criminal law from the CIJUREP. Research assistant at CIJUREP. Email address: [julio.mart33@gmail.com](mailto:julio.mart33@gmail.com).

## TABLE OF CONTENTS

I. INTRODUCTION .....	98
II. PUBLIC INTERNATIONAL LAW .....	99
Mexico and Public International Law .....	103
III. HUMAN RIGHTS.....	104
1. International Human Rights Regime, Arbitrary Detention .....	105
2. Human Rights in Mexico .....	108
IV. ARRAIGO .....	109

## I. INTRODUCTION

In this note, we will address a current issue with the hope of adding, as modestly as it may be, to the current legal discourse. Public international law is responsible for regulating the relations between states and, at certain points, the actions of states within their own territory. One of the manifest functions of the international legal framework is the protection and promotion of human rights, recognized as the minimum standard for the development of a dignified life. This framework is achieved through different instruments and entities endowed with the power to investigate and make recommendations, or, where appropriate, allow international tribunals to review cases and dictate binding sentences or advisory opinions.<sup>1</sup>

The international human rights legal framework includes, within the right to liberty, the prohibition of arbitrary deprivation of liberty. In Mexico, as part of the state's criminal policy, the arraigo figure is incorporated in the constitutional and legal framework, allowing the prosecutorial authority, without a judicial decision, to restrict a person's freedom by the mere accusation of having committed certain crimes, such as organized crime or drug trafficking, even before starting criminal proceedings or a formal indictment.<sup>2</sup>

In this context, I hypothesize that the current practice of arraigo constitutes a violation of Mexico's international violations by breaching international law prohibitions on arbitrary detentions. Thus, I will begin by exposing the different components, giving a brief introduction to the doctrines, that make up public international law, and its application in Mexico; general conception of human rights, international human rights framework, and human rights in Mexico; description of arraigo, its constitutional and legal basis, practices

<sup>1</sup> RESEARCH HANDBOOK ON INTERNATIONAL HUMAN RIGHTS LAW (Sarah Joseph, Adam McBeth eds., 2010).

<sup>2</sup> Porfirio Andrés Hernández, *Restricciones constitucionales y arraigo. Un tema pendiente para el Estado mexicano*, CENTRO DE ESTUDIOS CONSTITUCIONALES (Oct. 07, 2021), available at: <https://www.siti.ox.scjn.gob.mx/cec/blog-cec/restricciones-constitucionales-y-arraigo-un-tema-pendiente-para-el-estado-mexicano>.

and results for the achievement of justice. The aim is to establish whether the practice of arraigo in Mexico entails a violation of the State's international obligations.

## II. PUBLIC INTERNATIONAL LAW

Public international law regulates the relations between states, which, by subsuming their national laws, are bound by an international framework composed of different treaties, and organizations.<sup>3</sup> This law evolved through the following stages: Spanish scholastics, a theory developed by Tomás de Aquino on natural law as valid for all beings endowed with reason. Even if this theory did not develop into a true international law, it serves as a historical precedent; the first theorist to develop a conception of law as a universal right free from any religious canon was the Dutch Hugo Grotius in 1625. Giving way to European *ius publicum* (1648-1815),<sup>4</sup> which took place in the period between the culmination of the Thirty Years' War and the Congress of Vienna.

As a result, the seas were regulated and European territorial boundaries resized in order to achieve power balances and peace.<sup>5</sup> In the twentieth century, due to political and social changes generated by the world wars, states organized as international entities with the goal of regulating their relationships and preventing tragedies similar to those that made their creation necessary. The usefulness of these supranational organizations lies in their role as regulators of interstate relations, seeking to prevent and mitigate international armed conflicts. Thus, the aim was to create a legal system with rights and obligations, generating a framework of checks and balances as well as accountability from member states and their military and civil commands.

The ordinary subjects of public international law are states, understood to address four issues: permanent population, territory with well-defined geographical limits, government (a concept related with the self-determination of peoples), and the capacity to establish relations and treaties with other states and international entities. There is a limited relationship between a certain state's elements and their recognition by other states. Said recognition responds mostly to political matters, and it is possible for an emergent state with a weak government, or a territory in the process of consolidation, to receive limited de facto recognition.

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<sup>3</sup> See generally MATTHIAS HERDEGEN, DERECHO INTERNACIONAL PÚBLICO (Marcela Anzola trans., 2005).

<sup>4</sup> Steiger, Heinhard, *Ius publicum Europaeum (European public law)*, in ENCYCLOPEDIA OF EARLY MODERN HISTORY ONLINE (Graeme Dunphy & Andrew Gow eds., 2015), (Oct. 28, 2022), available at: [http://dx.doi.org/10.1163/2352-0272\\_emho\\_COM\\_021554](http://dx.doi.org/10.1163/2352-0272_emho_COM_021554).

<sup>5</sup> PETER N. STEARNS, THE ENCYCLOPEDIA OF WORLD HISTORY, 440 (6th ed., 2001), (last visited Oct. 27, 2022).

The extraordinary subjects of public international law are entities that fail to fulfill one or more of the above-mentioned elements but nevertheless have the capacity to establish relations and treaties as well as to interact with other organizations or international subjects. The global community has recognized them as important actors in international political life, their roles as observers and advisors are widely accepted, allowing them to interact with diverse subjects within public international law.

In addition to civil organizations, natural persons are subject to international law when they breach their duties and obligations (crimes against humanity, war crimes, genocide) or when they suffer persecution related to their ethnic origin, gender, religion, sexual orientation, or when their human rights are violated within a given territory, thus requiring international protection.

The sources of international law are set out, as references, in the International Court of Justice Statute.<sup>6</sup> Article 38.1 lists them from subsections “a” to “d”, with the first three subsections being primary sources (international conventions, international custom, general principles of law), while the fourth subsection represents auxiliary sources (judicial decisions and internal law doctrines of the various nations). One way for states to establish legal bonds is through unilateral declarations, which are understood as public manifestations of their will to be subject to certain conducts or policies based on good faith and the dependence of other actors upon these declarations. In a broader sense, unilateral declarations are all external behaviors by a state that may bring about legal obligations on the international stage.

Article 2(a) of the Vienna Convention on the Law of Treaties<sup>7</sup> defines treaties as international agreements entered into in writing and governed by international law. Article 38.1(a) of the ICJ Statute, on the court’s jurisdiction, establishes that the court shall base its decisions in accordance with international law, applying international conventions to which the states in dispute are parties, and it shall determine rules expressly recognized by them. In this sense, the ICJ Statute complements the Vienna Convention by recognizing treaties, as defined by the latter, as binding for the court’s decisions on the disputes that may emerge between states and are brought before its jurisdiction. Self-executing treaties do not require the implementation of internal legislation to become enforceable; non-self-executing treaties become enforceable only through the enactment of internal legislation —rules, decrees, laws— that allows for the correct execution of the instrument and the fulfillment of the acquired obligations.<sup>8</sup>

<sup>6</sup> Statute of the Court, U.N., (Apr. 18, 1946), (last visited Sep 5, 2022), available at: <https://www.icj-cij.org/statute>.

<sup>7</sup> Vienna Convention on the Law of Treaties, U. N., *Treaty Series* 1155, (May 23, 1969), (Entered into force on January 27, 1980), available at: [https://legal.un.org/ilc/texts/instruments/english/conventions/1\\_1\\_1969.pdf](https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf).

<sup>8</sup> See generally Arturo Santiago Pagliari, *El Derecho Internacional Público. Funciones, Fuentes, Cumplimiento y la Voluntad de los Estados*, IV ANUARIO MEXICANO DE DERECHO INTERNACIONAL 457-473 (2004).

The principle of *pacta sunt servanda* refers to state parties being bound to treaties they are part of and to their obligations to perform them in good faith, as referred in the preamble of the Vienna Convention as universally recognized and expanded upon in article 26. This means that states cannot excuse their breach or non-enforcement of previously recognized international instruments by claiming contrary internal statutes related to non-self-executing treaties, given that by adhering to a covenant state are bound to enact the necessary legislations and policies to fulfill their acquired obligations. According to article 31 of the Vienna Convention, treaties shall be interpreted in good faith, taking the ordinary customary meaning of the terms used, unless a special meaning has been given in the treaty or its instruments and accepted by the parties.

Similarly, account shall be taken of the context in which the treaty originated, the object and purpose for which it was created being part of such context, as well as all agreements, instruments, and practices that arise in connection with the treaty previously or subsequently, as well as the relevant practices of international law. Treaties must be agreed upon by a representative of the State that has full powers in accordance with article 7 of the Vienna Convention—the minister of foreign affairs, ambassadors and diplomatic representatives, heads of state, *i.e.*—and there are limits as to the reservations that can be made according to the treaty that is being entered into.

Protocols are the amendments made by state parties, whether in their entirety or not, to the conventions entered, and they create obligations only for those that are parties to the protocol. That is, if in a convention of 80 states, 10 states make a protocol amending part of said convention as regards the relations between those 10 states, the protocol generates obligations only for those states. Conventions are formal agreements between states, either treaties or some other instrument created and adopted by states, to establish or regulate their obligations and rights.

The term convention could refer to the fact that they are agreements of a more legislative nature and follow a similar process of discussion and approval. Charters or statutes are instruments that establish organizations, as is the case of the UN, and have an operational and organizational role in relation to treaties, acting as the instrument that grants authority and recognition to some institution as well as the rules under which it will be governed, an example being the ICJ Statute.

Reservations are unilateral declarations by states, when signing or ratifying—generally accepting and adhering to—a treaty, with the objective of modifying or excluding the legal effects of certain provisions in the treaty, thus canceling, or modifying the application, in the reserving state, of a particular part of the treaty. Reservations are invalid when the treaty in question does not accept them or rejects the type of reservation made, when they do not receive the approval of the rest of the state parties, or when the reservation is incompatible with the object and purpose of the treaty. Interpretative declarations

are instruments or agreements reached by the state parties or formulated by one of the states and accepted by the others, with the purpose of clarifying or guiding the interpretation of the treaty, giving clarity to ambiguous or overly broad concepts, in accordance with the object and purpose of the treaty.

Security Council resolutions take precedence over international treaties or conventions when the obligations and rights of the latter conflict with the determinations of the former. This is because the UN Charter,<sup>9</sup> Article 25, states that “The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter” while Article 103 declares that “In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail”.

International customs are the general practices that have been accepted as law, creating legal bonds to be adhered to. International practice is identified as the set of general, widespread, and representative behaviors carried out by a state in the exercise of its executive, legislative, or judicial functions on some particular subject and which contribute to the formation or expression of common law.<sup>10</sup> Besides, *opinio iuris* is distinguished from simple usage or simple habit by the acceptance of the general practice with the conviction of the existence of a legal obligation or a right. Acceptance can be proven by official governmental communications, diplomatic or public statements on behalf of the states, etc. Within international custom, there are persistent objectors to whom the doctrine in question does not apply. These are the States that have objected, from the early formation of any international custom to the general practice in a continuous manner, clearly expressed and communicated to the other States; the customary law rule will not be applied to the persistent objector as long as it maintains the objection.

The internationally wrongful acts of the state<sup>11</sup> may be of action or omission, and their elements are that they are attributable to the state under international law and that they constitute a breach of an international obligation of the state, according to the Draft Articles on Responsibility of States for Internationally Illegal Acts. Exceptions to responsibility are: the consent of the state that suffers the repercussions of the action of another state; self-defense according to the premises of the UN Charter; countermeasures in relation to the serious breach of obligations by another state; *force majeure*, unless it is the product of the state’s action or a risk assumed by it; extreme danger, unless it is the product of the state’s action or generates a greater or similar danger to that which is sought to be avoided; the situation of necessity; compliance

<sup>9</sup> U.N. Charter, U. N., (Jun. 26, 1945), (came into force on Oct. 24, 1945), available at: <https://www.un.org/en/about-us/un-charter>.

<sup>10</sup> JAMES CRAWFORD, BROWNIE’S PRINCIPLES OF PUBLIC INTERNATIONAL LAW, at Part VI (9th ed., 2019).

<sup>11</sup> *Ibid.* at part IX-X.

with peremptory norms. The foregoing is in accordance with Chapter V Part One of the Draft Articles on the Responsibility of States for Internationally Wrongful Acts.<sup>12</sup>

### *Mexico and Public International Law*

The systems for the reception of international law are the monist and dualist schools of thought. The former proposes international law and domestic law as manifestations of a single legal order, in which one or the other expression may be given supremacy, and all treaties become self-executing in nature. The latter recognizes them as two distinct legal orders of equal value and independent from each other, although interconnected. The ranges of value afforded to international instruments can be characterized, in general terms, as follows:

- *Supra-constitutional*: International instruments are above the constitution and the latter must be adapted to them when they are subscribed.
- *Constitutional*: International instruments must be in accordance with and complementary to the principles and contents of constitutional norms, having the same supplementary level of supremacy before the rest of the legal framework of a given state.
- *Supra-legal*: International instruments are below the constitution and above all other legal instruments of the State's legal order.
- *Legal*: International instruments are placed on a par with federal rules and norms, complementary to them and subordinate to the constitution, and their observance may be less strict.

The Political Constitution of the United Mexican States adopts the vision of the dualist school and grants a supra-constitutional value to international human rights instruments, with a supra-legal value for the rest of the treaties. According to the isolated thesis P. LXXVII/99 with digital record 192867,<sup>13</sup> issued by the SCJN plenary in the ninth era, international treaties are hierarchically placed above federal laws and in second place with respect to the federal constitution. Derived from its interpretation of article 133 of the Mexican charter, regarding the international commitments assumed by the state as binding for all authorities before the international community, the above SCJN opinion was made in 1999, after the constitutional reforms concerning human rights in 2011. Thus, it is understood, based on the first article, that

<sup>12</sup> Draft articles on Responsibility of States for Internationally Wrongful Acts, U.N. Int. Law Comm'n., Report, *II Yearbook of the Int. Law Comm'n., Part Two* (2001), available at: [https://legal.un.org/ilc/texts/instruments/english/commentaries/9\\_6\\_2001.pdf](https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf).

<sup>13</sup> Tratados Internacionales, Tesis P. LXXVII/99, SEMANARIO JUDICIAL DE LA FEDERACIÓN TOMO X, at 46 (SUP. COURTROOM, Nov. 1999), available at: <https://sjf2.scjn.gob.mx/detalle/tesis/192867>.



the treaties on human rights are at a level of supremacy above the constitution. In other words, human rights are above any hierarchy, since, in the event of a contradiction between the constitution and international human rights instruments, preference shall be given to the amplest protection, regardless of whether that is part of a treaty or the constitution.<sup>14</sup>

Thus, Mexican judicial authorities are obliged to apply a diffuse control of conventionality, seeking to grant the best available protection to human rights, as put by Víctor Manuel Collí:

...the IACtHR stated three things. First, diffuse control applies to all Mexican judges, regardless of jurisdiction (federal or state). Second, they must apply control of conventionality, which means that every judge, in any case at bar, is obliged to defend human rights found not only in the Mexican Constitution but also in international treaties. Third, the judge may, at will, analyze and decide a human rights violation, in any case under his or her study (*ex officio*). That is the meaning of diffuse control of conventionality *ex officio*.<sup>15</sup>

### III. HUMAN RIGHTS

According to Marie-Bénédicte Dembour there are four different schools of thought regarding Human Rights. The natural school observes the thought of human rights as inherent to persons and as entitlements of a negative and absolute character. The deliberative school conceives them as political values chosen to be observed by liberal societies, taking a critical approach to human rights as a possible tool to help better govern societies, but not necessarily universal, as it considers that this characteristic can only be achieved in time through a global consensus, noting its limitations in praxis.

The protest school takes a practical approach to human rights as a means to fight injustice in a never-ending labor, being skeptical of legislation since they view it as a routinization process that tends to favor the elite. The discourse school is distinguished by its lack of reverence for human rights, positing that their existence is limited to cultural discourse, where certain hegemonies are favored, thus considering them an ineffective tool.<sup>16</sup>

Our conception of Human rights tends toward the natural and deliberative schools, and even if we were to accept the conception of human rights as natural and inherent to the human person, in praxis they are only as functional as politically recognized. Thus, Human Rights are a set of norms that regulate

<sup>14</sup> JOSÉ LUIS SOBERANES FERNÁNDEZ, CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS. COMENTADA, 1075-77 (I.I.J., 21st ed., 2021).

<sup>15</sup> Víctor Manuel Collí Ek, *Improving Human Rights in Mexico: Constitutional Reforms, International Standards, and New Requirements for Judges*, 20 THE HUMAN RIGHTS BRIEF 7, at 12 (2012), available at: <https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1850&context=hrbrief>.

<sup>16</sup> Marie-Bénédicte Dembour, *What Are Human Rights? Four Schools of Thought*, 32 HUMAN RIGHTS QUARTERLY 1, 1-20 (2010).

the treatment of the human person and of recognized groups in a position of vulnerability, protecting them from the actions of the state and certain non-state entities. They operate based on ethical principles that are considered by society as the minimum standard for a dignified life. These rights are recognized and incorporated into the internal normative bodies of nations and, at the same time, form the foundation of public international law, being, according to the UN Universal Declaration of Human Rights, the base standard of objectives for the development of communities and nations.

### *1. International Human Rights Regime, Arbitrary Detention*

As mentioned above, human rights, their recognition and protection, are the main objectives of the United Nations, to achieve collective progress and guarantee global peace. Its operation is regulated by the international Bill of Rights (as it is known in the doctrine), which is a set of conventions (UDHR, ICCPR, ICESCR).<sup>17</sup>

Regarding the subject addressed in this paper, we are interested in the instruments that protect human rights, specifically the right to personal freedom. The first and most relevant one, as it marks a historical milestone in the recognition of human rights at a global level, is the Universal Declaration of Human Rights. The declaration is supplemented by the International Convention on Civil and Political Rights, the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, the Standard Minimum Rules for the Treatment of Prisoners, the United Nations Rules for the Protection of Juveniles Deprived of their Liberty, the United Nations Basic Principles and Guidelines on Remedies and Procedures relating to the Right of Persons Deprived of their Liberty to a Remedy before a Court of Law.

One of the ways in which people's freedom is violated is through arbitrary detention, which consists of deprivation of liberty before, during, and after trial, as well as administrative detention. The question of deprivation of liberty is one of fact if the persons cannot leave the place of his own free will. And it becomes arbitrary, according to Resolution 1997/50 of the former UN Commission on Human Rights, when it does not result from a final decision taken by a domestic judicial instance in accordance with domestic law, and when it is not in accordance with the international standards of the international Bill of Rights.

The UN Working Group on Arbitrary Detention has been mandated by the United Nations Human Rights Council to investigate cases of arbitrary detention or deprivation of liberty inconsistent with international standards.

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<sup>17</sup> U.N. OHCHR, Fact Sheet No.2 (Rev.1), THE INTERNATIONAL BILL OF HUMAN RIGHTS (Jun. 1st, 1997), available at: <https://www.ohchr.org/en/publications/fact-sheets/fact-sheet-no-02-rev-1-international-bill-human-rights-archive>.

This working group is able to request and receive information from governments and NGOs, as well as to get information from individuals concerned with the deprivation of liberty, either the person directly affected or their family and representatives. It has the authority to act on information submitted to it on alleged cases of arbitrary detention, sending urgent requests and communications to the governments concerned to clarify and bring attention to the cases. The working group is the only mechanism whose mandate expressly allows it to consider individual complaints aimed at qualifying a detention as arbitrary or not.

That means that its actions are based on the right of petition of individuals anywhere in the world. Being a special procedure of the Human Rights Council, it can interact with any UN member state regardless of which treaties the state is a party to or has ratified. The Working Group's criteria for defining arbitrary detention are:<sup>18</sup>

- *Category I*: When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (such as, for example, when a person is kept in detention after the completion of his or her sentence or despite an amnesty law applicable to the detainee). The instances of detention falling under this category may also concern cases when an individual has been deprived of liberty in absence of any legislative provision that would authorize such detention. It also often involves the failure of the national authorities to invoke a legal basis for an arrest: it is not sufficient that there is a national law authorizing the arrest in question, the authorities must invoke that national law, usually through the notice of the reasons for arrest and charges, the presentation of a duly issued arrest warrant and the regular judicial review, to justify the particular instance of detention.
- *Category II*: When the deprivation of liberty results from the exercise of the rights or freedom guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and, insofar as states parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the International Covenant on Civil and Political Rights. The cases falling under this category are those in which detention is used in response to the legitimate exercise of human rights, such as arresting peaceful protesters for the mere exercise of their rights to freedom of opinion and expression, freedom of assembly, and freedom of association, or detaining refugees for exercising their right to seek asylum and/or freedom to leave their own country.
- *Category III*: When the total or partial non-observance of the international norms relating to the right to a fair trial, established in the Uni-

<sup>18</sup> U.N. OHCHR, Fact Sheet No. 26, THE WORKING GROUP ON ARBITRARY DETENTION (May 2000), available at: <https://www.ohchr.org/sites/default/files/Documents/Issues/Detention/FactSheet2Gen.pdf>.

versal Declaration of Human Rights and in the relevant international instruments accepted by the states concerned, is of such gravity as to give the deprivation of liberty an arbitrary character. In order to evaluate the arbitrary character or otherwise of cases of deprivation of liberty under category III, the Working Group considers, in addition to the general principles set out in the Universal Declaration of Human Rights, several fair trial and due process criteria drawn from the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment and, for the states parties to the International Covenant on Civil and Political Rights, the criteria laid down particularly in articles 9 and 14 thereof. If the Working Group arrives at a finding that there have been violations of such due process rights, it then considers if these violations, taken together, are of such gravity as to give the deprivation of liberty an arbitrary character, thus falling under category III.

- *Category IV*: When asylum seekers, immigrants, or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy. When considering cases under this category, the Working Group notes the basic principle of international law that detention during migration proceedings must be the last resort and permissible only for the shortest period of time in each individual case, with the grounds for detention clearly and exhaustively defined in national legislation. The Working Group further examines if the legality of detention is open for challenge before a court within fixed time limits. The immigrants in irregular situations should not be qualified or treated as criminals.
- *Category V*: When the deprivation of liberty constitutes a violation of international law for reasons of discrimination based on birth; national, ethnic, or social origin; language; religion; economic condition; political or other opinions; gender; sexual orientation; or disability or other status, and which aims towards or can result in ignoring the equality of human rights.

The United Nations Basic Principles and Guidelines on Remedies and Procedures relating to the Right of Persons Deprived of their Liberty to a Remedy before a Court,<sup>19</sup> establish that the absence of effective mechanisms for judicial review of the legality of detention constitutes a violation of human rights. This right is a judicial remedy designed to protect personal liberty and integrity against arbitrary arrest, detention, enforced disappearance, prevent torture, degrading treatment or punishment. Such judicial remedy is essential

<sup>19</sup> U.N. Human Rts. Council, Report of the Working Group on Arbitrary Detention: United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court, A/HRC/30/37, (Jul. 6, 2015), available at: <https://www.ohchr.org/en/calls-for-input/report-basic-principles-and-guidelines-remedies-and-procedures-right-anyone>.

to preserve the constitutional rule of law in democratic societies. Principles two and three establish that domestic regulatory systems must guarantee this right, even at the constitutional level, to challenge the legality and arbitrariness of detention, to receive accessible and prompt remedies, and to constitute effective control over detention. The terms used are very important since the time lapse between detention and judicial review cannot exceed a certain limit without losing effectiveness in the protection of the right.

The Working Group, in its report on arbitrary detentions related to drug policies (A/HRC/47/40, 2021),<sup>20</sup> “has found that people who use drugs are particularly at risk of arbitrary detention and has noted with concern «increasing instances of arbitrary detention as a consequence of drug control laws and policies»”. The report also points out that the war on drugs has resulted in a disproportionate increase in detention and incarceration for drug-related offenses. The impetus of some states to comply with policies to combat drugs and organized crime has generated an atmosphere in which human rights violations are widespread and arbitrary detentions are on the rise. The participation, or invasion, of military commanders and troops in public and citizen security labor aggravates the situation, causing more and worse human rights violations with punitive results that have not proven effective in the fight against crime. The war on drugs has also generated a culture of corruption within police forces, particularly “regarding payments made to avoid arrest or to affect the outcome of judicial proceedings”.

## 2. *Human Rights in Mexico*

The purpose of every state is to maintain order and give a semblance of legal security to its inhabitants; the Constitutional Rule of Law represents this objective with the fundamental rights and dignities of the human person at the forefront of its entire operation and as its greatest foundation. It does so through its democratic composition and the separation and balances for the exercise of the supreme power conferred by the people to the state. Its objective is the construction of a more just society, in which all human beings can develop their potential freely and with the basic promise of a dignified existence.<sup>21</sup>

According to the introduction to the Universal Declaration of Human Rights issued by the UN<sup>22</sup> human rights are those inherent and inalienable dignities

<sup>20</sup> U.N. HUMAN RTS. COUNCIL, *Arbitrary detention relating to drug policies*, A/HRC/47/40, (May 18, 2021), available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G21/109/65/PDF/G2110965.pdf?OpenElement>.

<sup>21</sup> Raymundo Gil Rendón, *El estado constitucional de derecho y los derechos humanos*, III (6) PRAXIS DE LA J. FISCAL Y ADMIN. 243 (2011), available at: <https://www.tfja.gob.mx/investigaciones/historico/pdf/estadoconstitucionaldederechoylosderechoshumanos.pdf>.

<sup>22</sup> U.N., *UNIVERSAL DECLARATION OF HUMAN RIGHTS* (Dec. 10, 1948), available at: <https://www.un.org/en/about-us/universal-declaration-of-human-rights>.

of the human being, the recognition of which is the foundation of freedom, justice, and peace. They have been recognized in Mexico's founding charter, to varying degrees, since 1824. The current national constitution,<sup>23</sup> since its reform in 2011, seeks to give the highest possible standard of protection and recognition to human rights. Having the *pro personae* principle as its guiding light and obliging public servants to follow the principles of universality, interdependence, indivisibility, and progressiveness, and to prevent, investigate, punish, and redress human rights violations.

The above-mentioned reform has been characterized as birthing a new constitutional paradigm in which human rights are omnipresent.<sup>24</sup> The *pro personae* principle

...has been defined as “the hermeneutic criterion that informs the whole human rights legal system”. According to this, human rights norms should be interpreted as extensively as possible when recognizing individuals' rights and, by contrast, as restrictively as possible when the norm imposes limits on the enjoyment of human rights. At the same time, the principle commands that in case of conflicts between human rights norms, the norm that better protects the individual's rights should prevail.<sup>25</sup>

From this optic, we can clearly recognize what is stated above regarding the precedence of international law when related to human rights before any constitutional norm, as long as the international norm grants a better protection or allows for a less restrictive interpretation.

#### IV. ARRAIGO

Arraigo is a measure that seeks to prevent persons accused of organized crime from escaping criminal prosecution and interfering with the investigation process, thus depriving them of their freedom based on mere suspicions and without proper judicial control, endangering human rights.<sup>26</sup> Since the introduction of this figure at the constitutional level in 2008, no data can support its efficacy to mitigate organized crime or lessen the impunity rate.<sup>27</sup>

<sup>23</sup> CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS [CPEUM], Feb. 05, 1917, available at: <https://www.diputados.gob.mx/LeyesBiblio/ref/cpeum.htm>.

<sup>24</sup> Soberanes, *supra* note 14, at 4.

<sup>25</sup> Hayde Rodarte Berbera, *The pro personae principle and its application by Mexican courts*, 4 (1) QUEEN MARY HUMAN RIGHTS L. REV., 9 (2017).

<sup>26</sup> Soberanes, *supra* note 14, at 138.

<sup>27</sup> *La PGR arraigó a más de 12 mil personas; pero 1 de cada 10 eran inocentes*, Mucd (Feb. 2, 2019), (Oct. 28, 2022), available at: <https://www.mucd.org.mx/2019/02/la-pgr-arraigo-a-mas-de-12-mil-personas-pero-1-de-cada-10-eran-inocentes/>. From 2004 to 2018 a total of 12 071 people were kept under arraigo. 39% under 40 days, 47.2% over 40 days and 13.8% for 90 days; 73% of them



In Mexican domestic law, arraigo is a constitutional, valid, current and effective law: “It is important to point out that arraigo is a precautionary and not a procedural measure, since it is prior to the initiation of criminal proceedings, and is even used to continue with the investigation”.<sup>28</sup> It’s justified by Article 16 of the Federal Charter, which empowers the judicial authority to decree the arraigo for up to eighty days at the request of the Public Prosecutor’s Office (*Fiscalía General de la República*) and whenever “it is necessary for the success of the investigation, the protection of persons or legal assets, or when there is a well-founded risk that the accused will evade justice”.

As a first consideration, it could be said that we are faced with a provision contrary to article one of the Constitution itself. Contradiction of thesis 293/2011<sup>29</sup> establishes that, although in matters of human rights international treaties are at the rank of the Constitution as supreme law, the restrictions to such rights made within the Constitution will take precedence. In a related decision, the SCJN established the constitutionality of arraigo, as, even if contrary to international law, by being in the constitutional text, it could not be declared as unconstitutional. Voting against the plenary decision, justice Arturo Zaldívar Lelo de Larrea argues the interpretation of the 293/2011 decision is faulty. Since the constitutional text must be interpreted in accordance with the *pro personae* principle (as argued above), in order for the arraigo figure to be considered in a decision, the first step is to make the most favorable interpretation possible, as related to a person’s human rights.

The cited justice argues that, due to the nature of the figure as completely restrictive to personal liberty, it is not possible to interpret it through the *pro personae* lens; thus, the principle of constitutional precedence over international law when human rights are concerned, cannot be adequately applied since the cited interpretation establishes a case-by-case basis for this rule. Another reason for Justice Zaldívar’s dissent is based on his interpretation of article 7 of the American Human Rights Convention, regarding personal liberty. Article 7 introduces the obligation of states to inform detainees, without delay, of the reasons for their detention and any charges brought against them; and the right of detainees to be brought before a competent judicial authority, without delay, for their detention to be qualified or for other preventive mea-

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under suspicion of organized crime. 100% of the people kept under arraigo were jailed at the *Centro de Investigaciones Federales*, acting as a de facto penitentiary facility for people who had not received a sentence; INEGI, *Estadísticas judiciales en el marco del nuevo sistema de justicia penal en México* (2017), available at: <https://www.cdeunodc.inegi.org.mx/unodc/articulos/doc/20.pdf>.

<sup>28</sup> Porfirio Andrés Hernández, *Restricciones constitucionales y arraigo. Un tema pendiente para el Estado mexicano*, CENTRO DE ESTUDIOS CONSTITUCIONALES (Oct. 7, 2021), available at: <https://www.sitio.scn.gob.mx/cec/blog-cec/restricciones-constitucionales-y-arraigo-un-tema-pendiente-para-el-estado-mexicano>.

<sup>29</sup> SCJN determina que las normas sobre derechos humanos contenidas en Tratados Internacionales tienen rango constitucional, CONTRADICCIÓN DE TESIS 293/2011, SUP. COURTROOM (2013), available at: <https://www.scjn.gob.mx/derechos-humanos/sites/default/files/sentencias-emblematicas/sentencia/2020-12/CT%20293-2011.pdf>.

asures to be taken instead. In this context, Justice Zaldívar's argues that since persons subject to arraigo have not received a formal accusation and a criminal process has not been started against them, their juridical status cannot be properly subjected to an adequate judicial control.<sup>30</sup>

In this respect, we share the view expressed by the *Observatorio Ciudadano del Sistema de Justicia* on the arraigo figure as a state policy created and maintained by the three branches of power (judicial, legislative, and executive) in their different spheres of influence. Thus, said figure was created and elevated to constitutional level, and has been exploited through the prosecutorial authority, maintaining its legality and constitutionality through court decisions.<sup>31</sup>

Arraigo as an investigation tool has been characterized as existing in a procedural dichotomy wherein certain persons are subject to a differentiated legal process.<sup>32</sup> This creates an environment aligned with Günther Jakobs' theory on the law of the enemy, meaning that certain persons perceived to be a threat to society are neutralized through a differentiated legal system where they are stripped of their fundamental rights and penalties mostly consist of secret confinement (*incommunicado*).<sup>33</sup> A shred of darkness covers the practice of arraigo since the modality in which it takes place is not specified by law and is, instead, left to the will of the prosecutorial authority, creating an environment in which human rights cannot be properly guaranteed and detainees' communication with their lawyers faces a series of complications.

Therefore, we need to examine the Federal Law Against Organized Crime, which constitutes differentiated processes and penalties for persons accused, prosecuted, and sentenced for organized crime as described by the above-mentioned law. The arraigo figure and its requirements are mentioned starting in article 12:<sup>34</sup>

<sup>30</sup> EDUARDO FERRER MAC-GREGOR & ROGELIO FLORES PANTOJA, *LA CONSTITUCIÓN Y SUS GARANTÍAS. A 100 AÑOS DE LA CONSTITUCIÓN DE QUERÉTARO DE 1917. Memoria del XI Encuentro Iberoamericano y VIII Congreso Mexicano de Derecho Procesal Constitucional*, 957-967 (2017).

<sup>31</sup> Observatorio Ciudadano del Sistema de Justicia, *El arraigo penal como crimen de lesa humanidad* 6, at 6-46 (2019), available at: <https://www.cmdpdh.org/publicaciones-pdf/cmdpdh-arraigo-2019.pdf>.

<sup>32</sup> Roberto Andrés Ochoa Romero, *Antecedentes legislativos de la regulación actual sobre arraigo y colaboración con la justicia*, in *DESAÍOS DEL SISTEMA PENAL ACUSATORIO*, 110 (Patricia Lucita González Rodríguez & Jorge Alberto Witker Velázquez eds., 2019).

<sup>33</sup> Matteo Tondini, *Beyond the Law of the Enemy. Recovering from the Failures of the Global War on Terrorism through Law*, in *JURA GENTIUM: RIVISTA DI FILOSOFIA DEL DIRITTO INTERNAZIONALE E DELLA POLITICA GLOBALE* (2007), (Nov 16, 2022), available at: <https://www.juragentium.org/topics/wlgo/cortona/en/tondini.htm>. See Nigel S. Rodley & Matt Pollard, *The treatment of prisoners under international law*, 334 (3rd ed. 2009). An *incommunicado* detention happens when the detainees are not permitted to contact anyone besides their captors, violating the rights of detainees to legal assistance and judicial review of their detention.

<sup>34</sup> LEY FEDERAL CONTRA LA DELINCUENCIA ORGANIZADA [LFCDO], *Diario Oficial de la Federación* [DOF] 07-11-1996 (last reform May 20, 2021) (Mex.), available at: <https://www.diputados.gob.mx/LeyesBiblio/ref/lfcdo.htm>.



- The judicial authority responsible for the decree is the control judge upon the request from the public prosecutor. There is no rigorous standard or base probationary requirements for the decree. It is enough for the public prosecutor to justify it as necessary for the investigation's success, the protection of people or legally protected assets, or when there is a justified risk for the accused to subtract themselves from justice. Of these requirements, only the latter establishes a certain rigor by making it necessary for the public prosecutor to justify their petition. All the former requirements lack a minimum probationary standard.<sup>35</sup>
- The judicial authority must immediately reply to arraigo requests with a maximum answer time of six hours, and the decision can be made through any means “which guarantee its authenticity” or in private audience with the sole presence of the public prosecutor, who will name the modalities of place, time, and form as well as executing authorities. This gives the public prosecutor extremely broad power to decide how a person's personal liberty will be restricted, making it arbitrary.
- The judicial warrant that authorizes arraigo must contain, at least, the name, and post of the authorizing control judge, the identification data of the person subject to arraigo, the illegal facts for which the investigation is taking place, a specification of the reason for the arraigo, daytime and place for the execution of the arraigo. It is important to note that there is no requirement to further justify the measure, with the judge's obligation being only nominative of the reasons for which the arraigo has been approved without requiring them to argue or explain their reasoning.

From these elements, it would be a stretch to say that the law fulfills the requirements for exceptionality needed to consider the measure as appropriate.<sup>36</sup>

Based on the foregoing, it is evident that arraigo can be classified as category III of the UN Working Group's criteria for defining arbitrary detentions, since it represents a violation of due process, and constitutes a punitive penalty before a judicial decision. For the declaration of arraigo it is sufficient for the

<sup>35</sup> Sebastián Reyes, *El juicio como herramienta epistemológica: el rol de la verdad en el proceso*, 30 ANUARIO DE FILOSOFÍA JURÍDICA Y SOCIAL 236 (2012). A probationary standard can be defined as a legal tool which contains the criteria necessary to determine when sufficient proof of a fact has been obtained in order for a judge to justifiably make a decision.

<sup>36</sup> Luis González Placencia & Ricardo Ortega Soriano, *Excepciones constitucionales a un sistema de derecho penal de orientación democrática: delincuencia organizada y arraigo*, in DERECHOS HUMANOS EN LA CONSTITUCIÓN II, at 1476 (Eduardo Ferrer Mac-Gregor Poisot *et al.*, eds., 2013). Mentioning the Chaparro Álvarez vs. Ecuador case, as decided by the Interamerican Human Rights Court, the standard to determine a deprivation of liberty as proportionate is: For the object of the measure to be compatible with the American Convention on Human Rights; for the measure to be appropriate and there is not a less prejudicial option; for the benefits of the detention to be proportionate to the detriment of a person's human rights.

Public Prosecutor to state to the judicial authority that the defendant will be or is being investigated for organized crime and that, in order to protect the investigation, it is necessary to deprive them of their liberty; this is arbitrary since there is neither a justification that complies with international standards, nor a suitable means of proof that would allow the judicial authority to carry out a true control of legality, thus vitiating the decision taken.

Mexico is committed to the international community through the diverse instruments already mentioned and must adapt its legislation and internal policies to harmonize and guarantee the protection of human rights. While it is dangerous for any nation to see its sovereignty violated in favor of external instruments, it is less dangerous and even desirable for the progress of humanity when these adjustments are made in order to protect the basic requirements for human dignity. Currently, the UN Working Group on Arbitrary Detention and the Inter-American Commission on Human Rights are involved in a different review, recommendation, and judicial processes to hold the Mexican State accountable for its practices that violate the right to personal liberty, and to force it to make the necessary adjustments to its internal regime in order to comply with its international human rights commitments. Consequently, the Mexican nation can fulfill its international obligations by derogating the arraigo figure, since there exist other less restrictive tools that can help the prosecutorial authority in the investigations.

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